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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ELRIE CHARLES HOOKS,

Defendant and Appellant.

D069668

(Super. Ct. No. SCD262852)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed as modified.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Elrie Charles Hooks guilty of second degree robbery and found Hooks not guilty of attempting to dissuade a witness from reporting a crime. (Pen.

Code,¹ §§ 211, 136.1, subd. (b)(1).) The charges were brought after Hooks snatched money from the driver of a parked taxi.

Hooks appeals the robbery conviction, contending (1) there was insufficient evidence to establish he took the money by force or fear; (2) Hooks's actions did not "ripen" into a robbery under the common law; and (3) the trial court erred by staying, rather than striking, Hooks's prison prior.

For reasons discussed herein, we find substantial evidence supported the jury's verdict. We also conclude the actions of Hooks ripened into a robbery when he pushed the passenger door open and shoved the driver in order to facilitate his escape. Finally, we conclude the trial court did err when it stayed Hooks's prison prior rather than striking it. Accordingly, we modify the judgment to strike the one-year prison prior enhancement and direct the trial court to amend the abstract of judgment. The judgment is affirmed in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Prosecution's Case

On the evening of July 1, 2015, the victim was sitting in the driver seat of his taxi when Hooks knocked on the window of the cab and got in the back seat. The victim turned to Hooks and asked him where he would like to go. Hooks responded he would like to go "somewhere" and asked the victim if he had change for a \$100 bill. The victim

¹ All statutory references are to the Penal Code.

told Hooks he had change, and retrieved two \$20 bills and one \$10 bill from his pocket. While the victim held up the \$50, Hooks snatched the money from his hand.

The victim jumped out of his cab and went around to the right rear passenger side, where Hooks sat. The victim demanded his money back, but Hooks refused and began to open his door. The victim held the door and told Hooks not to leave, but Hooks refused. Hooks pushed the victim out of the way with the taxi door as he exited the vehicle.

The victim called the police, but the two began to argue. On the 911 call, which was played for the jury, the victim reported that he had been robbed and the robber pushed him. Hooks pushed the victim on the shoulder, causing his phone to drop on the ground and crack the screen. As the victim picked up his phone, Hooks walked away.

Police officers arrived shortly and spoke with the victim about the robbery. After speaking to the police, the victim drove to a nearby taxi stand. Across the street from the taxi stand was a Rite Aid store. A few hours later, the victim saw Hooks walk into the Rite Aid. He called the police and when the officers arrived, he pointed out Hooks as the man who robbed him. When Hooks exited the Rite Aid, he was immediately detained by a San Diego police officer. The officer searched Hooks and found \$15, then presented Hooks for a curbside lineup. The victim confirmed Hooks was the robber, and Hooks was arrested.

The officer testified Hooks wore a global positioning system (GPS) ankle bracelet, which was working at the time of Hook's arrest. A State of California employee who specializes in GPS, testified Hook's movements were tracked by his GPS and placed him at the scene of robbery.

2. Defense's Case

Hook's primary defense was that he was misidentified by the victim, based on an implicit bias developed during the curbside lineup. In support, he presented the testimony of a clinical psychologist, who stated that the presentation of a single person during a curbside lineup may lead to bias because the person presented is "going to be the most like the culprit because nobody else is there." An investigator for the public defender's office testified that Hooks had a bus pass when he was arrested and booked into jail.

Hooks also testified. At trial, he admitted confronting the victim, but testified he saw another man fleeing the scene. Hooks testified that he found a \$10 bill on the sidewalk, so he picked it up. Hooks saw the victim and walked towards him, but noted that he was speaking a different language on the phone. The victim accused him of taking \$20, but Hooks denied taking the money. Hooks wadded up the \$10 bill and flung it at him. Hooks testified he did not touch or push the victim. Hooks stated he never entered the taxi, and the encounter with the victim lasted roughly one minute. Following the incident, he walked away and went to a nearby shopping center. Roughly an hour and a half later, Hooks walked over to the Rite Aid store where he was arrested. Hooks admitted he never gave this story to the police.

3. Verdict

The jurors convicted Hooks of robbery and acquitted him of attempting to dissuade a witness from reporting a crime. The trial court sentenced Hooks to 11 years in

prison, consisting of six years for the robbery offense and a five-year serious felony enhancement. The court also imposed and stayed a one-year prison prior enhancement.

DISCUSSION

I

Hooks contends insufficient evidence supported the jury's verdict finding him guilty of robbery because it is questionable whether he used force or fear. Thus, Hooks argues this court should reduce his robbery conviction to petty theft. We disagree.

A.

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) "It is the use of force or fear which distinguishes robbery from grand theft from the person." (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1707 (*Mungia*).) "The crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety." (*People v. Estes* (1983) 147 Cal.App.3d 23, 28 (*Estes*).)

The force used must be more than a "quantum of force which is necessary to accomplish the mere seizing of the property," but only enough force to sufficiently overcome the victim's resistance. (*People v. Morales* (1975) 49 Cal.App.3d 134, 139.) "The element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for [his] property." (*People v. Davison* (1995) 32 Cal.App.4th 206, 212.) "[T]he fear necessary for robbery is subjective in nature, requiring proof 'that the victim was in fact afraid, and that such fear

allowed the crime to be accomplished.' " (*People v. Anderson* (2007) 152 Cal.App.4th 919, 946, quoting *Mungia, supra*, 234 Cal.App.3d at p. 1709, fn. 2.)

This court reviews the sufficiency of the evidence to uphold a robbery conviction by viewing " 'the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citations.] When undertaking such review, our opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment." (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.)

" 'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder.' " (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

B.

Hooks argues he used only the minimal force necessary to snatch the cash out of the victim's hand, which is insufficient to support his conviction for robbery. He asserts the snatching of the cash from the victim was the extent of the robbery, and the force he used to push open the cab door could not overcome the victim's resistance. Hooks also contends the force used to push the victim, causing him to drop his phone on the ground,

should be attributed to his dissuading a witness charge and not considered as force to effectuate the asportation of the money. Hooks also argues there is no evidence allowing the inference of fear because the actions of the victim demonstrate he was not in fear at the time of the robbery.

In order to support a robbery conviction, some force, other than the force used to take the property, must be demonstrated. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246.) In *Mungia*, this court held there was sufficient evidence to support a robbery conviction where the defendant shoved the pregnant victim, then snatched her purse. (*Mungia, supra*, 234 Cal.App.3d at pp. 1708-1709.) In *Garcia*, the court held evidence demonstrating the defendant pushed up against the victim to move her out of the way to reach into the cash register went beyond the " 'quantum of force which is necessary to accomplish the mere seizing of the property.' " (*Garcia, supra*, at p. 1246.)

Hooks argues these cases are distinguishable because the force applied to the victims occurred before and at the time of the robbery, while the present case involves force applied after Hooks snatched the money from the victim's hand. It is established law, however, that "a robbery can be accomplished even if the property was peacefully or duplicitously acquired, if force or fear was used to carry it away." (*People v. Gomez* (2008) 43 Cal.4th 249, 255 (*Gomez*).) "The crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property." (*Estes, supra*, 147 Cal.App.3d at p. 27.) In *Estes*, the defendant stole a coat and vest and was followed to the parking lot by a security officer of the store. (*Id.* at p. 26.) After being approached

by the officer, the defendant brandished a knife and threatened to kill the officer. (*Ibid.*) The court held the force or fear applied against the victim was "in furtherance of the robbery and can properly be used to sustain the conviction." (*Id.* at p. 28.)

Similarly here, Hooks's actions following the snatching of the money cannot be detached from the commission of the robbery. The force Hooks used to push open the taxi door while the victim stood behind it, was enough to overcome his resistance. The victim testified that while he was holding the door, Hooks pushed it hard. The victim struggled to hold the door, but when Hooks pushed it he "decided not to fight it anymore." Additionally, the force Hooks used to push the victim's shoulder while he called 911 was also enough to overcome his resistance. Hooks pushed the victim hard enough for him to drop his phone. In sum, Hooks applied force to overcome the victim's resistance so that Hooks could escape with the money. Such force is sufficient to sustain his conviction.² (*Estes, supra*, 147 Cal.App.3d at p. 28.)

II

Hooks next asserts the *Estes* decision conflicts with the common law because it allows a theft to "ripen" into a robbery after the theft occurs. Hooks argues the California robbery statute enacted in 1872 was patterned off the common law definition, and the holding of *Estes, supra*, 147 Cal.App.3d 23 represents an unwarranted judicial expansion of the original statute.

² Having determined that Hooks used force during the commission of the robbery, we need not address his arguments with respect to fear. (§ 211.)

The Supreme Court has rejected this contention and Hooks provides no basis to deviate from that precedent, which we are bound to follow. (See *People v. Williams* (2013) 57 Cal.4th 776, 787 (*Williams*); *Gomez, supra*, 43 Cal.4th at p. 257; *People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court."].)

We recognize that California's robbery statute "closely tracked the definition of robbery," which described robbery as the "felonious taking" of another's property by force, intimidation, violence, or fear.³ (*People v. Tufunga, supra*, 21 Cal.4th at pp. 945-946.) However, "[i]n this state, it is settled that a robbery is not completed at the moment the robber obtains possession of the stolen property and that the crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property." (*People v. Anderson* (1966) 64 Cal.2d 633, 638.)

³ California's first statutory schemes were codified in 1850, and incorporated portions of common law into the new statutes. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945-946, comparing § 59 of the Crimes and Punishments Act of 1850 ["'Robbery is the *felonious* and violent *taking* of money, goods, or other valuable thing from the person of another, by force or intimidation.' (Stats. 1850, ch. 99, § 59, p. 235, italics added.)], with 4 Blackstone [Commentaries 230], at p. 242 [robbery 'is the *felonious* and forceful *taking* from the person of another of goods or money to any value, by violence or putting him in fear' (italics added)].) "Felonious taking" is essentially the same as common law larceny, which is defined as "the taking and carrying away of someone else's personal property, by trespass, with the intent to permanently deprive the owner of possession." (*Williams, supra*, 57 Cal.4th 776, 782, citing 2 Burdick, Law of Crime (1946) § 496i, p. 261.)

Hooks relies upon outdated authority from the Michigan Supreme Court, which treats the initial act of stealing the property as a theft and the subsequent violence on the victim as an assault.⁴ (*People v. Randolph* (2002) 466 Mich. 532, 538, fn. 6.) This interpretation of the common law is inconsistent with our Supreme Court's decisions, and we decline to apply it here. (See e.g. *Gomez, supra*, 43 Cal.4th at p. 258 ["[R]obbery is a continuing offense. If the aggravating factors are in play at any time during the period from caption through asportation, the defendant has engaged in conduct that elevates the crime from simple larceny to robbery"].)

III

Finally, Hooks contends the trial court erred when it imposed the five-year enhancement under section 667 and stayed the one-year additional term for the prison prior. We agree.

The California Supreme Court held that a defendant cannot incur sentence enhancements under both sections 667 (serious felony) and 667.5 (prison prior) based on a single prior conviction. (*People v. Jones* (1993) 5 Cal.4th 1142, 1153 (*Jones*).) The *Jones* court concluded that where a five-year serious felony enhancement under section 667, subdivision (a) and a one-year prison prior under section 667.5, subdivision (b) are imposed for the same prior conviction, the proper remedy is to remand the matter to "the

⁴ As noted in *People v. Williams*, the Michigan Legislature subsequently amended the robbery statute to include "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." (*People v. Williams* (2012) 491 Mich. 164, 171, citing Mich. Comp. Laws Serv. § 750.530 [amended by the 2004 Pub. Acts, No. 128].)

trial court with directions to *strike* the one-year enhancement of defendant's sentence . . . under subdivision (b) of section 667.5." (*Id.* at p. 1153, italics added.)

At sentencing, the trial court imposed a three-year sentence for the robbery conviction, which was doubled to six years pursuant to section 667, subdivision (e)(1) for Hook's prior strike, and imposed a five-year enhancement for Hook's prior conviction pursuant to section 667, subdivision (a). The court then added, "zero for the one year consec' under 667.5(b) because it's stayed pursuant to 654 – actually it's *People versus Jones*." Because the proper remedy under *Jones, supra*, 5 Cal.4th 1142 is to strike the one-year enhancement under section 667.5, subdivision (b), the court erred in staying, rather than striking, the one-year prison prior enhancement.⁵ (§ 667.5, subd. (b).)

DISPOSITION

The judgment is modified to strike the prison prior enhancement (§ 667.5, subd. (b)) and the trial court is directed to prepare a corrected abstract of judgment and to

⁵ Respondent argues the enhancement was properly stayed pursuant to rule 4.447 of the California Rules of Court, as reflected in *People v. Lopez* (2004) 119 Cal.App.4th 355 and *People v. Langston* (2004) 33 Cal.4th 1237. Both cases are distinguishable. *Lopez* involved a multiple victim special circumstance under the habitual sex offender law (§ 667.71, subd. (c)(4)), which allowed the trial court to sentence the defendant under either the qualifying prior sexual offense or under the alternative sentencing scheme of the one strike rule. The trial court imposed the one strike rule sentence and stayed the special circumstances, which was consistent with the "unequivocal command that 'the court shall not strike' any special circumstance finding under the one strike law." (*Lopez, supra*, at p. 366, citing section 667.61, subd. (f).) In *Langston*, the court found a defendant's completed prison term for escape from prison is a separately served prison term within the meaning of section 677.5. (*Langston, supra*, at p. 1241.) The present case does not involve a special circumstances enhancement, or an escape from prison.

deliver the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.